

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROBERT TAIT	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
GMAC MORTGAGE CORP.	:	
Defendant.	:	NO. 00-4577

M E M O R A N D U M

Newcomer, S.J.

February , 2001

I. BACKGROUND

This is a reverse employment discrimination case under Title VII of the Civil Rights Act of 1964. Plaintiff Robert Tait ("Tait"), a Caucasian, was formerly employed by defendant GMAC Mortgage Corp. ("GMACM"). GMACM is a Pennsylvania corporation involved in the mortgage servicing industry.

In late August 1999, defendant terminated Tait and three other members of his department. Plaintiff alleges that he and his co-worker, Darren Lopes ("Lopes"), an African American male, performed the same job, yet Mr. Lopes retained his job when defendant terminated plaintiff.

On January 15, 1996, defendant hired plaintiff to work as a loan officer. Then, on February 10, 1997, defendant moved plaintiff to a new position within GMACM, Real Estate Manager. His salary for both of these positions was \$47,000 per year. On October 1, 1997, plaintiff received a salary increase to \$52,000 per year, and his title changed to Director, Corporate Real Estate. Then, and on February 1, 1998, he received another

salary increase to \$56,000. Later that month, on February 20, 1998, plaintiff received a \$5200 discretionary bonus.

On July 31, 1998 defendant recruited plaintiff for the position of National Account Executive in the Affinity Services Department, a position which plaintiff accepted. That position paid plaintiff a base salary of \$70,000 per year effective October 15, 1998, with a guaranteed \$10,000 bonus for his first year. However, on September 25, 1998, plaintiff received a retroactive merit pay raise to \$70,000 effective February 1, 1998.

Thereafter, on February 1, 1999 plaintiff began his responsibilities as Vice President of Affinity Services, the last position he held at GMACM. On February 19, 1999, plaintiff received a discretionary bonus of \$8842. Plaintiff further alleges that plaintiff consistently received positive reports and feedback, in addition to his salary increases and promotions, throughout his employment at GMACM.

As Vice President of Affinity Services, plaintiff was responsible for developing long term relationships with large corporations and organizations on a national basis. These relationships involved agreements whereby the other company would allow GMACM to market, or would market on GMACM's behalf, GMACM's mortgage services to the company's customers or employees. In return, GMACM would provide the partner company's customers or employees with a special service or rate on its mortgage products. When plaintiff first started as Vice President, he

reported to Peter Connors, Vice President of Affinity Services. Subsequently, on May 1, 1999, plaintiff began reporting to Terry Gorbach, Senior Vice President of Affinity Services.

On June 28, 1999, Lopes was hired as Vice President of Affinity Services,¹ allegedly to perform the same job functions as plaintiff, as both were responsible for new business development. Lopes was brought to GMACM by Jim Kinney, a person GMACM hired as a diversity consultant. Before GMACM hired Lopes, Lopes met with twelve senior managers at GMACM, but none of them offered Lopes a position. Ultimately, GMACM hired Lopes without consulting with the Affinity Department, and did not pay Lopes out of the Affinity Department budget because there was allegedly no money in that budget. Instead, Lopes' salary came out of the budget of Ben Smith, the Vice President in charge of the Affinity Services department.

When hired as Vice President, Lopes' salary was \$131,000 per year, plus a \$25,000 salary bonus. On the other hand, Mr. Gorbach, a Senior Vice President in the Affinity Services Department, received an annual salary of \$132,000. There is evidence that Lopes had substantial sales experience at high level positions with several large financial institutions. Additionally, immediately before coming to GMACM, Lopes' annual

¹Defendant suggests that Lopes was hired as Vice President of Affinity Markets, but plaintiff has offered evidence that his and Lopes' job title were the same. Because this is a summary judgment motion, the Court accepts plaintiff's evidence on this matter.

compensation was about \$135,000 and included a salary, stock options, annual bonus and a country club membership. However, Lopes had no background in the mortgage industry, and there is evidence that Lopes went on a vacation immediately after he was hired.

On July 15, 1999, Tait learned through conversations with Mr. Connors and Lopes that Lopes earned substantially more money than Tait. Consequently, plaintiff called Julie Vesci in the defendant's human resources department to complain about the disparity between plaintiff's and Lopes' salary. On July 26, 1999, Ms. Vesci told plaintiff that Lopes and plaintiff had the same job title, same job description and same job responsibilities.² Additionally, Ms. Vesci allegedly told plaintiff that there was no reason why Lopes should have received a higher salary than plaintiff, including the fact that the two men had different prior work experience.

On August 3, 1999, plaintiff had a review meeting with Terry Gorbach and Mr. Connors where the three reviewed plaintiff's work for GMACM. At that meeting, plaintiff raised the issue of the disparity between his salary and Lopes' salary. Later that month, plaintiff again raised the disparate salary issue with other GMACM high level employees. One of those times,

²To the extent these statements are offered without proper foundation to prove the truth of the matters asserted therein, said statements are hearsay and the Court does not consider them in arriving at its decision today. See Shelton v. University of Medicine & Dentistry of New Jersey, 223 F.3d 220, 223 (3rd Cir. 2000).

plaintiff met with Joe Kilmartin, a GMACM official, who told plaintiff he would discuss the issue with Rick Gillespie, GMACM's Senior Vice President, Marketing and Communication.

In mid August 1999, Rick Gillespie ("Gillespie") assumed the responsibility of managing the Affinity Group and decided to substantially reduce its size and operations (the "reorganization"). More specifically, Gillespie decided to limit the group's focus to servicing existing relationships, and to cease the pursuit of new relationships, at least temporarily. As part of the reorganization, four of the seven members of the Affinity group were laid off: plaintiff; Karen Daye, an African-American; Claire Miraglia, a Caucasian; and Terry Gorbach, a Caucasian. Those retained were: Peter Connors, a Caucasian; Fern Baker, a Caucasian, and Lopes. Defendant contends that he laid off Tait because Tait worked only on generating new relationships. After he was laid off, plaintiff was not replaced, and his work did not continue.

There is evidence that Lopes was retained even though he had not "picked up" his E-mail for three weeks, had not checked his voice mail, had not been on any presentations or sales calls except for one on July 27, 1999, and had not submitted any status reports on his activities.

Later, on February 11, 2000 Lopes was also laid off. Defendant explains that Lopes was only retained at first because of his financial services background. When originally retained, GMACM gave Lopes the task of marketing a financial services

product that GMACM had developed to large financial institutions. When this arrangement was unsuccessful, Lopes' position was eliminated, and Lopes was laid off.

After his lay off, plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission, ("EEOC"), which determined that there was no probable cause to support plaintiff's discrimination claim. Now, plaintiff raises two counts in his Complaint: 1) defendant violated Title VII, 42 U.S.C. § 2000, when it terminated his employment on the basis of race; and 2) defendant violated the Pennsylvania Human Relations Act ("PHRA"), 43 PA. CONS. STAT. §§ 951-63, when it terminated his employment on the basis of race. Plaintiff's Complaint further alleges that defendant terminated plaintiff in retaliation for exercising his rights. Defendant also suggests in its motion that plaintiff may advance a claim of discriminatory pay against defendant.

II. DISCUSSION

A. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c) (1994). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex

Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324.

A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3rd Cir. 1992).

Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3rd Cir. 1992).

B. Tait's Title VII and PHRA Claims

Under 42 U.S.C. Section 2000e-2, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (West 1997). In a case such as this one where the evidence of discrimination is circumstantial, courts employ the burden shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Iadimarco v. Runyon, 190 F.3d 151, 157 (3rd Cir. 1999).³

Accordingly, if a plaintiff alleges race-based employment discrimination, the plaintiff must first "present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII." Id. (applying McDonnell Douglas to a case involving a white plaintiff claiming employment discrimination).

Once the plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. See Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410 (3rd Cir. 1999). With respect to this step, defendant's burden is satisfied if it explains what it has done or produces evidence of legitimate

³Race discrimination claims brought under the PHRA follow the same standards and methods of analysis as those brought under Title VII. See Bullock v. Children's Hospital of Philadelphia, 71 F. Supp.2d 482, 485 (E.D. Pa. 1999).

nondiscriminatory reasons for its actions. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). However, "the defendant need not persuade the court that it was actually motivated by the proffered reasons." Id. at 254. Finally, should the defendant carry its burden, the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. See Jones, 198 F.3d at 410.

1. Plaintiff's Discriminatory Termination Claim

In accordance with the McDonnell Douglas framework just described, defendant argues that this Court should grant summary judgment against plaintiff's claim of discriminatory termination. Defendant first asserts that plaintiff cannot establish a prima facie case that he was terminated based upon his race. Although it is a close call, the Court cannot agree with defendant's contention here.

While it is true that when GMACM laid off Tait it also laid off Karen Daye, an African American, and that Lopes was ultimately laid off too, plaintiff has presented evidence that he had consistently received favorable work reviews, promotions, raises and bonuses throughout his employment at GMACM. Additionally, plaintiff's evidence suggests that Lopes was not only hired because of his experience in the financial services

industry, but also because he could add diversity to GMACM. Thus, defendant clearly saw some benefit to hiring and retaining a diverse work force, a fact that suggests that when given the choice between laying off plaintiff or Lopes, GMACM might have retained Lopes because of his race.

Plaintiff has further presented evidence that both he and Lopes had the same job title, performed the same job functions, and that despite failing to pick up his E-mails for three weeks, answering his voice mail, and not making sales presentations or submitting status reports, GMACM retained Lopes, but laid off Tait. In light of plaintiff's record at GMACM of bonuses, promotions, raises, and favorable reviews, these facts suggest that defendant retained Lopes because of his race, and not because of his performance. Therefore, this Court cannot conclude that Tait has failed to present sufficient evidence to allow a fact finder to conclude that GMACM treated Tait less favorably than Lopes based upon Tait's race.

Defendant next argues that even if plaintiff can present a prima facie case of discriminatory termination, that there is no evidence that GMACM's reason for laying off plaintiff is pretextual. Here, defendant contends that it terminated plaintiff as part of a reorganization effort within the Affinity Group. More specifically, GMACM decided to limit the Affinity Group's focus to servicing existing relationships, and to cease

the pursuit of new relationships, at least temporarily.

Defendant further explains that it laid off Tait because Tait worked only on generating new relationships, and retained Lopes because of Lopes' background in the financial services industry, and GMACM's intention to use Lopes to market a financial services product it created.

To prove that GMACM's proffered reason is pretextual, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered nondiscriminatory reasons ... was either a post hoc fabrication or otherwise did not actually motivate the employment action." Iadimarco, 190 F.3d at 166 (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3rd Cir. 1994)). To do so, Tait must demonstrate that defendants proffered reasons are so weak, implausible, inconsistent, incoherent or contradictory, that a reasonable factfinder could not rationally find them credible. See Fuentes 32 F.3d at 765.

Although plaintiff makes several disjointed arguments to suggest that defendant's reason for terminating plaintiff was pretextual, the thrust of his position is that Tait had substantial experience at GMACM, had experience with existing clients, and that given Lopes' lack of experience in the mortgage industry and unproven record at GMACM, it made little sense for GMACM to lay off Tait and retain Lopes.

However, Tait cannot simply show that GMACM's decision

to retain Lopes, but lay off plaintiff, was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. See Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108-09 (3rd Cir. 1997). That defendant retained Lopes because of his background in the financial services industry, and laid off Tait as part of a larger reorganization is undisputed. Additionally, the Court finds that plaintiff has failed to demonstrate that defendant's proffered reason lacks credibility. Defendant's explanation is especially credible because after Tait was laid off, he was not replaced, and his work did not continue. Moreover, Lopes was ultimately laid off too once his new marketing arrangement with GMACM proved unsuccessful. Consequently, the Court will grant defendant's Motion for Summary Judgment on plaintiff's claim of discriminatory termination.

2. Plaintiff's Claim of Retaliatory Termination

For a plaintiff to establish a prima facie case of retaliation: he must show that: (1) he was engaged in protected activity; (2) he was discharged subsequent to or contemporaneously with such activity; and (3) there is a causal link between the protected activity and the discharge. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3rd Cir. 1997).⁴

⁴Claims of retaliation under the PHRA follow the same standards and method of analysis as those made under Title VII.

Once plaintiff establishes a prima facie case of retaliation, the Court's analysis proceeds under the McDonnell Douglas framework discussed above. See id. at n. 2.

For purposes of its motion, defendant concedes that plaintiff could prove the first two elements of his prima facie case. However, defendant argues that plaintiff cannot establish a causal connection between his termination and his complaints regarding the wage disparity between his salary and Lopes' compensation.

Although there is evidence that Rick Gillespie, the decision maker who had recently taken over responsibility for the Affinity Group, did not know of plaintiff's complaints regarding the wage disparity, this evidence must be considered in light of the fact that plaintiff complained to five people within the company about the discrimination plaintiff allegedly faced. Indeed, one of those people, Joe Kilmartin, even told plaintiff that he would discuss plaintiff's complaints with Gillespie. Whether or not Rick Gillespie really did not know of plaintiff's complaint is an issue of fact for a jury to consider. Moreover, that plaintiff was terminated only days after plaintiff complained to Mr. Connors and Mr. Gorbach about the wage disparity issue can give rise to an inference of causation sufficient to satisfy plaintiff's burden. See Jalil v. Avdel

See Woodson, 109 F.3d at 919-20.

Corp., 873 F.2d 701, 708 (3rd Cir. 1989); see also Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173, 177 (3rd Cir. 1997).

Thus, the Court concludes that plaintiff can make out a prima facie case of retaliatory termination.

Defendant next argues that even if plaintiff can establish a prima facie case of retaliatory termination, plaintiff cannot demonstrate that defendant's proffered justification was pretextual. Here again, the Court acknowledges that defendant's proffered reason for terminating plaintiff appears credible because after Tait was laid off, he was not replaced, and his work did not continue.

However, plaintiff's evidence of retaliatory discharge is far stronger than his evidence of discriminatory termination. Its strength makes defendant's proffered reason less believable than it was in the context of plaintiff's discriminatory termination claim. Additionally, even though Tait was not replaced, nor did his work continue, it remains possible that Tait was laid off because of his complaints. Presumably, the employees in the Affinity Group who GMACM did retain, even temporarily, did not make similar disparate wage complaints. Indeed, when setting forth its proffered reason for terminating plaintiff, defendant fails to account for its retention of Peter Connors and Fern Baker. Accordingly, the Court will not grant defendant's Motion for Summary Judgment on plaintiff retaliatory discharge claim.

3. Discriminatory Pay

Finally, defendant suggests that plaintiff raises a claim of discriminatory pay and then moves for summary judgment on that claim. However, upon a review of plaintiff's response to defendant's motion, and plaintiff's Complaint, it does not appear that plaintiff makes such a claim. Thus, because plaintiff does not raise a claim for discriminatory pay, the Court will not rule on whether summary judgment is proper on that claim.

For the foregoing reasons, the Court will grant defendant's Motion for Summary Judgment in part, and deny it in part.

Clarence C. Newcomer, S.J.